Supreme Court, U.S.
FILED
APR 5

(2)

No. 99-1499

In the Supreme Court of the United States

STUART AND BEVERLY BAUMGARD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, petitioners are entitled to a refund of federal income taxes that they paid for their 1984 tax year when they did not make an overpayment of their taxes for that year.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 11) is not reported. The opinion of the Court of Federal Claims (Pet. App. 1-10) is reported at 42 Fed. Cl. 301.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1999. The petition for rehearing was denied on December 14, 1999 (Pet. App. 12-13). The petition for a writ of certiorari was filed on March 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On their original 1984 federal income tax return, petitioners reported a tax due of $1,278. That amount was assessed by the Internal Revenue Service and paid by petitioners (C.A. App. 68). Petitioners later filed an amended federal income tax return for 1984, on which they reported an additional tax liability of $76,274. That amount, along with interest of $23,639, was assessed by the Service and paid by petitioners (*ibid.*).

On an amended 1986 federal income tax return, petitioners claimed a theft loss deduction of $815,000 with respect to their investment in an automobile dealership (Pet. App. 2). The theft loss claimed by petitioners resulted in a net operating loss for them for 1986. Petitioners then filed a second amended return for 1984 on which they carried back a portion of the 1986 net operating loss. This resulted in a claim for refund of $72,484 for 1984 (*ibid.*).

In October 1988, petitioners were sent a notice by the Service which stated that the "[a]mount to be refunded to you if you owe no other obligations [is] $95,290.02" (Pet. App. 3).[1] This amount was not actually refunded to petitioners, however, due to an ongoing audit of a partnership in which petitioners had an interest (*ibid.*).

During this same period of time, the Internal Revenue Service informed petitioners that it was considering disallowing the theft loss claimed for 1986 "on the grounds that [petitioners] had a reasonable prospect of recovery and failed to substantiate the loss was due to theft" (Pet. App. 3). When petitioners were thereafter informed that the 1986 theft loss was in fact disallowed (*ibid.*), they paid the resulting deficiency for 1986 and

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[1] That amount consisted of $72,484 in tax and $22,806.02 in interest with respect to petitioners' 1984 taxable year (Pet. App. 3).

filed a claim for refund of that tax, which the Service denied. Petitioners did not thereafter file a refund suit concerning the 1986 tax year, and the disallowance of the claimed loss for that year thus became final (C.A. App. 40-46, 50, 278).

The Internal Revenue Service, however, made no adjustment to its records for petitioners' 1984 account to reflect that the carryback of the 1986 loss had been disallowed. Instead, the agency's records continued to show a tentative credit balance in favor of petitioners for the 1984 year (Pet. App. 2-3). When the partnership matter was finally resolved, with no effect on petitioners' 1984 tax year, petitioners requested a refund of the tentative $95,290.02 credit balance for that year. The Service refused to make the refund: since there was no 1986 loss to carry back to 1984, petitioners were not entitled to a refund for 1984 (*id.* at 4).

2. Petitioners then filed this suit against the United States in the Court of Federal Claims, asserting that they were entitled to recover damages upon an "account stated." The court held that the October 1988, statement that petitioners received from the Service did not constitute an "account stated" because it was, by its very terms, provisional and tentative (Pet. App. 6). The court noted, moreover, that petitioners "do not claim that they overpaid their taxes" for 1984 and that the basis for any claim of an "account stated" thus simply did not exist (*id.* at 7).

The court rejected petitioner's reliance on the decision of this Court in *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258 (1931), which "stands for the proposition that a contract with the Government for a remittance of taxes could exist, irrespective of the statute of limitations on refund suits" (Pet. App. 8). The court explained that *Bonwit Teller* has no applica-

tion when, as here, no contract was made by the government to remit any funds to petitioners (Pet App. 8).

The court also rejected petitioners' argument that, because the government had tentatively proposed to abate the original assessment of the 1984 taxes, (i) the Service should be required to make a new assessment of the $95,290.02 to retain the money paid by petitioners for that year and (ii) such a new assessment would now be barred by the applicable statute of limitations. The court noted that, even if an abatement occurred, petitioners' contentions would fail under *Lewis* v. *Reynolds*, 284 U.S. 281 (1932), which held that a taxpayer must establish that he has overpaid his taxes in order to obtain a refund of them and that, when the taxpayer fails to do so, the government may retain payments of amounts that might have been (but were not) timely assessed (Pet. App. 8-9).

3. The court of appeals affirmed per curiam without opinion (Pet. App. 11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other appellate court. Further review is therefore not warranted.

1. In the trial court, petitioners "presented their claim not as a tax refund case but as a contract case" (Pet. App. 10). Petitioners now assert, however, that they are "simply demanding that the IRS make the payment required by Section 6402" (Pet. 10). That statute authorizes the government to make a refund "of any overpayment." 26 U.S.C. 6402(a). Petitioners may not properly raise here a "refund" claim that they did not present to the trial court.

On the merits, the obvious flaw in petitioners' claim for a refund for their 1984 taxes is that they made no "overpayment" of taxes for that year. As this Court has stated, an overpayment is a "payment in excess of that which is properly due." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 531 (1947). Although petitioners' account did tentatively show a credit balance when a part of the 1984 assessment was abated due to the carryback of the claimed loss from 1986, the Service subsequently determined that the claimed 1986 loss was not allowable. Petitioners could have contested that determination in court but declined to do so. The Service's determination that the loss is not allowable is therefore now conclusive. And, since there was no valid loss from 1986 to carry back to 1984, the amount of taxes paid by petitioners for 1984 was correct and there is thus no "overpayment" of taxes for 1984 to be refunded under Section 6402.

2. To obtain a refund of taxes paid, the taxpayer must establish an actual overpayment of tax, not simply the absence of an assessment. As this Court explained in *Lewis* v. *Reynolds*, 284 U.S. at 283:

> While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied. An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

Since petitioners did not, in fact, overpay their 1984 taxes, the government properly refused to make any refund to petitioners even if an "assessment" of the amount already paid would no longer be timely. See *Lewis* v. *Reynolds*, 284 U.S. at 283; *Moran* v. *United States*, 63 F.3d 663, 666 (7th Cir. 1995) ("As our earlier discussion of *Lewis* implies, the Morans are not entitled to a refund because they did not overpay their taxes, and the lack of a timely assessment does not change that fact."); *Ewing* v. *United States*, 914 F.2d 499, 502-504 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991).

3. Petitioners err in asserting (Pet. 12, 19) that the decision in this case is inconsistent with the decision in *Estate of Michael* v. *Lullo*, 173 F.3d 503 (4th Cir. 1999). That case did not concern a taxpayer's attempt to recover an alleged overpayment of taxes. In that case, pursuant to a closing letter, the Service agreed with the taxpayer that a certain amount of estate tax was due. The Service then assessed the agreed-upon amount, and the taxpayer satisfied its obligation largely through the use of a foreign tax credit. At that point, no tax was due to the government and no refund was due to the taxpayer. After the period provided for by the statute of limitations on assessments thereafter expired, however, the Service determined that there were additional assets of the estate that should have been considered in determining the tax due. It was then too late to assess any deficiency. The Service, however, did not need to assert a deficiency because it believed that the amount of the foreign tax credit should not be applied in full against the liability of the estate. In a mandamus action, the court of appeals concluded that the taxpayer was entitled to obtain the full foreign tax credit. In the course of that decision, the court stated that the doctrine of *Lewis* v. *Reynolds* created a shield for the

government that allowed it to retain payments already made—and did not create a sword that allowed the government to demand payment of amounts not yet received. 173 F.3d at 508. That reasoning is, of course, consistent with the decision in this case: the courts below applied *Lewis* v. *Reynolds* in precisely that manner to allow the government to retain payments already made without regard to whether "assessment" of those amounts could still be made (Pet. App. 9 (citing *Lewis* v. *Reynolds*, 284 U.S. at 283)).

Petitioners also err in asserting (Pet. 18) that the decision in this case is inconsistent with *Vishnevsky* v. *United States*, 581 F.2d 1249 (7th Cir. 1978). In *Vishnevsky*, it was undisputed that the taxpayers had, in fact, overpaid their taxes. Indeed, the court expressly noted that "[t]he fact and amount of overpayment have been determined by the I.R.S., and no suggestion is made that the determination was in any way irregular or inaccurate." *Id.* at 1254. The government had not refused to make the refund in *Vishnevsky* on the ground that an overpayment had not been made; instead, the government contended that the taxpayer failed to file a timely claim for refund. *Ibid.* That case thus presented a different legal question from the one at issue here. The court in *Vishnevsky* determined that, "in the unique circumstances" of that case, the timely claim requirement had been satisfied by correspondence between the Service and the taxpayer indicating a final allowance of the refund claim (*ibid.*). That factual determination in *Vishnevsky* has no application, even by analogy, to the different facts of this case,

which involves a "provisional and tentative," not a final, administrative calculation of liability (Pet. App. 6).[2]

Finally, petitioners are incorrect in asserting (Pet. 3, 18-19) that the decision in this case conflicts with *Sokolow* v. *United States*, 169 F.3d 663 (9th Cir. 1999). In *Sokolow*, when the taxpayer filed a separate return, his account was mistakenly credited by the Service with a payment made by his wife. When this mistake was discovered, the Service removed the credit from the taxpayer's account to correct the resulting liability. The taxpayer, however, claimed that the statute of limitations on making a new assessment had expired by that time and sought an injunction to bar the Service from collecting this liability. The court of appeals held that the taxpayer's action was barred by the Anti-Injunction Act (26 U.S.C. 7421). The court rejected the contention that the taxpayer had no adequate remedy at law, for the taxpayer could pay the tax and sue for a refund. 169 F.3d at 665. In so holding, the court of appeals noted that Congress has now provided by statute that any tax paid after collection is barred by the statute of limitations is to be considered an overpayment. *Ibid.* (citing 26 U.S.C. 6401(a)). In the present case, however, the taxes were paid *before* the period for collection expired and thus no "overpayment" was made for which a refund is allowed. See *Ewing* v. *United States*, 914 F.2d at 502-504.

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[2] Petitioners' citation (Pet. 16-17) to *Rosenman* v. *United States*, 323 U.S. 658 (1945), and related cases is similarly inapposite. Those cases involved disputes as to whether amounts remitted to the IRS were remitted as payments of tax or as deposits. See *Baral* v. *United States*, 120 S. Ct. 1006 (2000). In the present case, it is undisputed that the amounts at issue were remitted to the government as payments of tax.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2000